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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LAURANCE B. WOLFBERG AND CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a $2,250,000 punitive damage award, which plaintiff recovered on malicious prosecution and abuse of process claims against his sister and brother-in-law where plaintiff's out-of-pocket loss was approximately $34,000 in legal fees, is so excessive as to violate the Due Process Clauses of the Fifth and Fourteenth Amendments.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

Statement of the Facts 2

Proceedings Below 5

REASONS FOR GRANTING THE WRIT 7

I. THE QUESTION PRESENTED—WHICH CALLS UPON THE COURT TO DEVELOP THE DUE PROCESS STANDARDS FOR EXCESSIVENESS REVIEW OF PUNITIVE DAMAGES—IS SUBSTANTIALLY SIMILAR TO A QUESTION THAT THIS COURT HAS GRANTED CERTIORARI TO REVIEW IN *BMW* 7

II. IF THE COURT DOES NOT DECIDE THE EXCESSIVENESS QUESTION IN *BMW*, THE INSTANT CASE PRESENTS AN APPROPRIATE OPPORTUNITY FOR THE COURT TO DECIDE THIS IMPORTANT AND RECURRING ISSUE 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: Page(s)

Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813 (1986) 12

Blunt v. *Little*, 3 F. Cas. 760 (C.C. Mass. 1822) (No. 1,578) 10

BMW of North America, Inc. v. *Gore*, 644 So.2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) (No. 94-896) 7,8,9,14

Eans v. *Grocer Supply Co.*, 580 S.W.2d 17 (Tex. Ct. App. 1979) 11

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1939) 13

Glasgow v. *Fox*, 757 P.2d 836 (Okla. 1988) 12

Hewlett v. *Cruchley*, 5 Taunt. 277, 128 Eng. Rep. 696 (C.P. 1813) 9

Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331 (1994) 7,9

Kitchens v. *Bryan County National Bank*, 825 F.2d 248 (10th Cir. 1987) 11

Landgraf v. *USI Film Prods.* 114 S. Ct. 1483 (1994) 13

Lipari v. *Volume Shoe Corp.*, 664 S.W.2d 953 (Mo. Ct. App. 1983) 11

Moore v. *Target Stores, Inc.*, 571 P.2d 1236 (Okl. 1977) 11

Pacific Mutual Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 7

Seaboard Air Line R. Co. v. *Seegers*, 207 U.S. 73 (1907) 7

Southwestern Tel. & Tel. Co. v. *Danaher*, 238 U.S. 482 (1915) 13

Spaeth v. Union Oil Co. of Calif., 762 F.2d 865 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986) 13

TXO Production Corp. v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) 7

Young v. *First State Bank, Watonga*, 628 P.2d 707 (Okla. 1981) 12

Constitutional Provisions, Statutes, and Rules:

U.S. Const., amend. V 2

U.S. Const., amend. XIV 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1332 2

Okla. Stat. Ann. tit. 21, § 10 (West 1983) 12

Okla. Stat. Ann. tit. 21, § 550 (West 1983) 12

Okla. Stat. Ann. tit. 21, § 551 (West 1983) 12

Okla. Stat. Ann. tit. 21, § 584 (West 1983) 12

Other Authorities

Brief *Amici Curiae* of Life Ins. Co. of Ga., *et al.*, in *BMW of N. Am., Inc.* v. *Gore*, No. 94-896 10

D. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705 (1989) 7

Petition for Certiorari, in *BMW of N. Am., Inc.* v. *Gore*, No. 94-896 8,10

R. Stern, *et al.*, *Supreme Court Practice* (7th ed. 1993) 8

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

LAURANCE B. WOLFBERG AND CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Laurance B. Wolfberg and Carolyn Wolfberg respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reprinted at App. 1a-18a. The Court of Appeals' unpublished order denying the petition for rehearing and suggestion for rehearing in banc is reprinted at App. 19a-20a. The unpublished order of the District Court denying petitioners' post-trial motions is reprinted at App. 21a-28a. The opinion of the Supreme Court of Oklahoma, answering questions certified by the Court of Appeals in this case, is reported at 890 P.2d 895, and reprinted at App. 29a-51a.

JURISDICTION

The District Court had jurisdiction of this case under 28 U.S.C. § 1332. The Court of Appeals' jurisdiction was based on 28 U.S.C. § 1291. That court issued its order denying petitioners' timely petition for rehearing on June 16, 1995, and this petition is being filed within ninety days of that date. This Court therefore has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clauses of the Fifth and Fourteenth Amendments, which are set out verbatim at App. 60a.

STATEMENT OF THE CASE

This case arises from a dispute between a brother (respondent Robert I. Greenberg) and sister (petitioner Carolyn Greenberg Wolfberg) over the administration of a family trust, and a falling-out between two brothers-in-law (Mr. Greenberg and petitioner Laurance B. Wolfberg, who is the husband of Mrs. Wolfberg) who were once business partners. This family feud escalated into civil litigation, and Mr. Greenberg now has a $2,250,000 punitive damage award on claims of malicious prosecution and abuse of process against his sister and brother-in-law.

Statement of the Facts

Respondent is a trustee and Mrs. Wolfberg is a potential beneficiary of the Mal Greenberg Testamentary Trust ("Greenberg Trust"), which was established by their now-deceased father. App. 2a. Mr. Wolfberg and respondent were once partners or co-owners in several business ventures, including the Green Wolf partnership and Service Business Forms. App. 2a-3a. In 1982, Mr. Wolfberg and respondent agreed to separate their business interests, and Mr. Wolfberg acquired control of all the shares of Service Business Forms. App. 2a-3a. As part of this acquisition, Service Business Forms executed a note to the Greenberg Trust to purchase shares held by the trust. App. 2a-3a.

In subsequent years, the relationship between petitioners and respondent deteriorated, leading to the five lawsuits described below. These cases were the predicate lawsuits for the malicious prosecution and abuse of process claims brought by respondent against petitioners in the present action. App. 3a.

Case # 1

Mr. Wolfberg filed a complaint against respondent in the United States District Court for the Western District of Oklahoma in November 1986, seeking the dissolution and accounting of Green Wolf partnership, as well as damages for respondent's alleged conversion of a partnership loan to his personal use. App. 3a. Although the court denied Mr. Wolfberg's claim for damages, Mr. Wolfberg succeeded in obtaining dissolution of the partnership and an accounting, and respondent's motion for attorneys' fees and costs was denied by the magistrate, who concluded:

> [Mr. Wolfberg's] lawsuit was not totally groundless. He succeeded in obtaining an accounting and final dissolution of the partnership. While the Court has held that [Mr. Wolfberg] had not proved his cause of action based on breach of fiduciary duty, this holding does not presume the lawsuit was frivolous. On the contrary, [Mr. Wolfberg] had a legally and factually arguable claim for relief that was ultimately resolved against him.

App. 59a. The Tenth Circuit affirmed, and this Court denied Mr. Wolfberg's petition for a writ of certiorari. App. 3a-4a.

Case # 2

This case was brought in Oklahoma state court in November 1986 by petitioners and Service Business Forms against respondent in both his individual and trustee capacities, as well as against the other trustees of the Greenberg Trust. App. 4a. The claims, which alleged breach of contract and fraud, were voluntarily dismissed without prejudice. App. 4a.

Case # 3

Mrs. Wolfberg brought suit in Oklahoma state court against respondent and the other trustees of the Greenberg Trust in December 1986, seeking an accounting, removal of trustees, dissolution of the trust, and distribution of property, as well as damages from respondent individually for breach of fiduciary duty. App. 4a. The case was voluntarily dismissed without prejudice. App. 4a.

Case # 4

In this case, filed in Kansas state court by Mrs. Wolfberg against the trustees of the Greenberg Trust in September 1987, Mrs. Wolfberg sought removal of the trustees for hostility. App. 4a. The court found in favor of the trustees, and no appeal was taken from the judgment. App. 5a.

Case # 5

Neither Mr. Wolfberg nor Mrs. Wolfberg was a party to this case, which was brought in December 1986 by respondent and the other trustees of the Greenberg Trust against Service Business Forms. App. 5a. In this action, filed in the United States District Court for the Western District of Oklahoma, the trustees sued to collect on the note that had been given by Service Business Forms to the Greenberg Trust. App. 5a. In March 1987, Service Business Forms counterclaimed on the ground that the note was unenforceable until respondent disclaimed any interest in the note. App. 5a. The district court granted summary judgment to the trustees on their claim and denied the counterclaim. App. 5a. The Tenth Circuit affirmed, and this Court denied the petition for a writ of certiorari filed by Service Business Forms. App. 5a.

Proceedings Below

The present action was filed in August 1990, and brought to trial a year later. At trial, respondent argued that the five predicate cases discussed above established the

liability of petitioners for malicious prosecution or abuse of process. App. 3a.

With respect to damages, respondent testified that his unreimbursed "out-of-pocket" legal fees for the five predicate actions totalled "around $34,000." App. 56a. In addition, respondent testified that, as a result of the time he had spent on the lawsuits, he had not been able to participate in a new golf course venture in which he would have received a ten percent interest that he valued at approximately $250,000. App. 53a.

On August 22, 1991, the jury returned a verdict in favor of respondent on all issues, awarding $284,000 in "general damages" against both petitioners, $500,000 in punitive damages against Mrs. Wolfberg, and $1,750,000 in punitive damages against Mr. Wolfberg. App. 2a. The District Court denied petitioners' post-trial motions. App. 21a-28a.

In rejecting petitioners' motion for remittitur of damages, the District Court stated—as if the issue before it were merely a matter of "evidence" rather than one of constitutional significance—that "there is no evidence that the punitive damages awarded were excessive." App. 27a. The court also asserted that "[t]he record is replete with evidence of the net worth of the parties" and that "[t]estimony concerning the profit on the Wolfbergs' home alone could leave the jurors ample information to base their damages awards on." App. 27a.[1] The court, however, engaged in no analysis of the size of the punitive damage

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[1]The District Court did not make any findings concerning the specific net worth of petitioners or the amount of "profit" on the sale of their home. Although respondent asserted in closing argument that petitioners had a net worth of over $20 million, petitioners' post-trial net worth was listed as $7,352,339 in their application for a supersedeas bond, a copy of which was filed with the District Court as an exhibit to petitioners' post-trial pleadings.

award other than to state that "the Wolfbergs' self-described 'smart money' had to have been enough to genuinely smart any budget." App. 27a.

On May 11, 1995, the Tenth Circuit issued its opinion affirming the District Court's judgment. App. 1a-18a. That court recognized that punitive damages were imposed on petitioners for conduct that had never previously been declared tortious by an Oklahoma state or federal court. The Court of Appeals observed that "[t]here is apparently no Oklahoma case law on a malicious prosecution action grounded on repetitive civil proceedings." App. 6a. Also, that court recognized that this case presented several issues of first impression under Oklahoma law by granting petitioners' motion for certification of four questions of law to the Supreme Court of Oklahoma.[2] Nevertheless, the court below upheld the punitive damage awards in their entirety. In a four-sentence discussion, the court rejected petitioners' arguments that the awards were "excessive considering the defendants' net worth," App. 17a, and that the Oklahoma statute that governs punitive damage awards, as applied in this case, violates federal due process, App. 17a. ("The Oklahoma statute does not violate due process as the Appellants urge.").

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[2]These issues were: (1) whether the five cases discussed above could "be considered as a single suit (the "Process") for purposes of alleging malicious prosecution and abuse of process claims regardless of the varied disposition and success of the various separate actions"; (2) "whether the statute of limitations applicable to both the malicious prosecution and abuse of process claims should be applied to each individual action or to the Process"; (3) whether the statute of limitations for the abuse of process claim began "to run with the commencement or the termination of each individual action or of the Process"; and (4) "[w]hat . . . the duration of the statute of limitations" is "on an abuse of process claim." App. 29a-30a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED—WHICH CALLS UPON THE COURT TO DEVELOP THE DUE PROCESS STANDARDS FOR EXCESSIVENESS REVIEW OF PUNITIVE DAMAGES—IS SUBSTANTIALLY SIMILAR TO A QUESTION THAT THIS COURT HAS GRANTED CERTIORARI TO REVIEW IN *BMW*

"'[P]unitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values.'" *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 n.8 (1991) (quoting D. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 739 (1989)). Indeed, as this Court has recently recognized, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2340 (1994). To guard against this danger, the Due Process Clauses of the Fifth and Fourteenth Amendments impose "substantive limits 'beyond which penalties may not go.'" *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993) (quoting *Seaboard Air Line R. Co.* v. *Seegers*, 207 U.S. 73, 78 (1907)); *see also Honda*, 114 S. Ct. at 2335 ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damage awards.").

In *Honda*, this Court held that judicial review of the size of punitive damages awards is required as a matter of due process. *See id.* at 2341. This Court, however, has never precisely articulated "the character of the standard that will identify unconstitutionally excessive awards." *Id.* at 2335.

Earlier this year, the Court granted certiorari in *BMW of North America, Inc.* v. *Gore*, 644 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) (No. 94-896), in which the standard for constitutional excessiveness review is at issue. In *BMW*, an Alabama jury assessed $4,000,000 in punitive damages against an automobile manufacturer because of its failure to disclose to a car buyer that the car was partially refinished. *See* 646 So. 2d at 627. The

Supreme Court of Alabama determined that remittitur of the punitive damage award to $2,000,000 would be appropriate. *Id.* at 629. In *BMW*, this Court has agreed to review two questions, the second of which is "[w]hether the $2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment." Petition for Certiorari at I, in *BMW of N. Am., Inc.* v. *Gore*, No. 94-896.

The question presented in the instant case is substantially similar to the second question presented in *BMW*. Thus, both the case at bar and *BMW* present this Court with the opportunity to provide meaningful guidance regarding the standard that should be applied in determining whether a punitive damage award is grossly excessive in violation of due process. The similarity of the question presented here and the second question presented in *BMW* suggests that the Court would hold this petition until *BMW* has been decided and then grant certiorari in this case and remand for appropriate disposition in light of the Court's decision in *BMW* on the excessiveness issue.[3]

In *BMW*, the petitioner argues on the merits that federal due process requires: (1) close proportionality between the harm caused—as measured by actual damages—and the punitive damage award; (2) that punitive damages must not be disproportionate to the severity of the misconduct; and (3) that punitive damage awards must bear a reasonable

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[3]It is generally recognized that "[w]here the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision." R. Stern, *et al., Supreme Court Practice* § 4.16, at 192-93 (7th ed. 1993).

relationship to civil fines imposed for similar conduct by the pertinent jurisdiction. Opening Brief of Petitioner, at 32-51, in *BMW*. If this Court accords constitutional significance to any or all of these factors, or to other factors that the Court may identify in deciding *BMW*, then it is plain that petitioners' federal due process challenge to the punitive damage awards at issue here would, at the very least, have to be reconsidered by the Tenth Circuit in light of *BMW* unless this Court were otherwise to grant plenary review of this case.

II. IF THE COURT DOES NOT DECIDE THE EXCESSIVENESS QUESTION IN *BMW*, THE INSTANT CASE PRESENTS AN APPROPRIATE OPPORTUNITY FOR THE COURT TO DECIDE THIS IMPORTANT AND RECURRING ISSUE

If this Court does not reach or fully address the excessiveness issue in *BMW*, this case provides an appropriate vehicle for articulating the due process standards for excessiveness review of punitive damages.[4] Guidance from the Court in this area is sorely needed, as lower courts are being called upon with increasing frequency to review punitive damage awards and such awards are now commonly imposed in staggering amounts

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[4]The instant case illustrates the danger of excessive damages that courts have long recognized to exist in malicious prosecution cases. As this Court observed in *Honda*, by the early nineteenth century, it was "'well acknowledged in all the Courts of *Westminster-hall*, that whether in actions for criminal conversion, **malicious prosecutions**, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury.'" *Honda*, 114 S. Ct. at 2336 (quoting *Hewlett* v. *Cruchley*, 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (C.P. 1813)) (emphasis added). And, in what is believed to be the first federal court decision ordering remittitur of punitive damages, Justice Story determined that exemplary damages on a malicious civil prosecution claim were excessive. *See Blunt* v. *Little*, 3 F. Cas. 760 (C.C. Mass. 1822) (No. 1,578).

that bear no reasonable relationship to the conduct being punished. *See, e.g.*, Petition for Certiorari in *BMW*, at 26-29; Brief *Amici Curiae* of Life Ins. Co. of Ga., *et al.*, in *BMW*, at 14-21, App. A-C.

The instant case is a remarkable example of this phenomenon. Petitioners' conduct resulted in no physical injury to plaintiff or anyone else. Although the jury awarded respondent "general damages" of $284,000, his out-of-pocket loss was no more than approximately $34,000 in legal fees, and his other "injuries," according to his own testimony, consisted primarily of lost time that he could have been spent in developing a business opportunity that he heard about (a new golf course). These "harms" to respondent, if they can be characterized as such, certainly do not justify the $2,250,000 punitive damage award at issue.

Nor can the size of the punitive exaction be justified by any arguable potential harm from the petitioners' conduct. The District Court concluded that the predicate lawsuits "were contrived to succeed by destroying the familial status of plaintiff, and thereby bring him to his knees," App. 12a, 14a, 25a, and that "[p]laintiff alleged and succeeded in proving that defendants' overall strategy was to financially break plaintiff, [and] destroy his perceived position in the family." App. 12a, 14a, 21a. Accepting this view of the evidence, however, it is difficult to imagine how a family dispute apparently motivated by sibling rivalry can justify a punitive damage award of the magnitude imposed here, especially considering the relatively small amount of money that respondent actually spent in litigating the predicate cases at issue.

The amount of punitive damages awarded to respondent is particularly troubling in that the $2,250,000 award easily dwarfs the size of punitive damages awarded in every other reported malicious prosecution case decided under

Oklahoma law.[5] For example, in *Moore* v. *Target Stores, Inc.*, 571 P.2d 1236 (Okla. 1977), the plaintiff was awarded only $35,000 in punitive damages on claims of malicious prosecution and false arrest resulting from her having been falsely accused and actually arrested on charges of shoplifting. The conduct of petitioners alleged in the case at bar pales in comparison to the conduct at issue in *Moore*, yet the punishment imposed on petitioner is more than sixty times greater. And, in *Kitchens* v. *Bryan County National Bank*, 825 F.2d 248 (10th Cir. 1987), the plaintiff recovered only $60,000 in punitive and compensatory damages on a malicious prosecution claim against a bank after the plaintiff had prevailed on criminal theft charges brought by the district attorney as a result of false accusations against the plaintiff made by the bank's president.[6] The limited size of punitive damage awards in these Oklahoma malicious prosecution cases undoubtedly reflects the hostility towards this tort under Oklahoma law. *See, e.g.*, App. 51a ("malicious prosecution is a tort disfavored by our jurisprudence"); *Glasgow* v. *Fox*, 757 P.2d 836, 838 (Okla. 1988) ("malicious prosecution actions are not favored and should not be encouraged by lax rules favoring them"); *Young* v. *First State Bank, Watonga*, 628 P.2d 707, 709 (Okla. 1981) (same).

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[5]Petitioners have located no reported case decided under Oklahoma law in which punitive damages were awarded for an abuse-of-process claim.

[6]The punitive exaction against petitioners also easily surpasses the amount of punitive damages awarded in virtually every reported malicious prosecution case decided in other jurisdictions. *See, e.g.*, *Lipari* v. *Volume Shoe Corp.*, 664 S.W.2d 953 (Mo. Ct. App. 1983) (customer acquitted of criminal charges of shoplifting was awarded $13,000 in actual damages and $74,000 in punitive damages against the store); *Eans* v. *Grocer Supply Co.*, 580 S.W.2d 17 (Tex. Ct. App. 1979) (employee acquitted of misdemeanor theft charge instigated by employer was awarded $70,000 in actual damages and $5,000 in punitive damages).

Also, the $2,250,000 punitive damage award far exceeds the maximum criminal fines for criminal conduct most analagous to malicious prosecution and abuse of process. Common barratry—defined as "the practice of existing groundless judicial proceedings," Okla. Stat. Ann. tit. 21, § 550 (West 1983), "in at least three instances, and with a corrupt or malicious intent to vex and annoy," Okla. Stat. Ann. tit. 21, § 552—is a misdemeanor carrying a maximum fine of $500, Okla. Stat. Ann. tit. 21, §§ 10, 551. Similarly, the maximum criminal fine is $500 for the misdemeanor of maliciously instituting or prosecuting any action or legal proceeding or making or procuring any arrest in a false name. *See* Okla. Stat. Ann. tit. 21 §§ 10, 584.[7]

Moreover, and as recognized by the court below, punitive damages were awarded in this case for conduct never previously recognized as tortious under Oklahoma law. In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court recognized that retroactive imposition of punitive damages based on a new common-law cause of action would "raise important [constitutional] issues which, in an appropriate setting, must be resolved." *Id.* at 828-29. Two Terms ago, the Court similarly observed that "[r]etroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf* v. *USI Film Prods.* 114 S. Ct. 1483, 1505 (1994); *see also Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 489 (1915) (due process violated where punitive damages were imposed based upon new judicial construction of a statute statute and "[t]here had been no decision in the state holding or indicating that" the defendant's conduct was unlawful). The same constitutional concerns arise here, as well as the substantial question whether the federal courts

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[7]Although a maximum one-year term of imprisonment may also be imposed for the above-described misdemeanors, Okla. Stat. Ann. tit. 21, § 10, petitioners have located no reported Oklahoma decision in which any imprisonment was imposed for these misdemeanors.

below, consistently with their obligations under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1939), properly upheld what is by far the largest punitive damage award in any malicious prosecution or abuse-of-process case decided under Oklahoma law.

Finally, the size of the punitive damage award cannot be justified in light of petitioners' wealth. Although respondent asserted at trial that petitioners' net worth was $25 million, petitioners' net worth stood as determined by CPAs and legal advisers at $7,352,339, as of the time of their application for a supersedeas bond. The $2,250,000 punitive damage award is almost *one-third* of the latter figure—a percentage that far surpasses the percentage of the defendant's net worth represented by the punitive damage award in virtually every other punitive damage case. *See, e.g., Spaeth v. Union Oil Co. of Calif.*, 762 F.2d 865, 866-67 (10th Cir. 1985) (affirming remittitur of punitive damage award from $3 million to $2 million against a defendant with $3.3 *billion* net worth), *cert. denied*, 476 U.S. 1104 (1986).

In sum, this case presents an example of a punitive damage system that is out of control. Something is wrong with a system that permits an individual plaintiff to obtain a $2,250,000 punitive exaction against his own sister and brother-in-law, taking away almost one-third of their wealth, where the plaintiff suffered no physical injury, was never falsely arrested, had a pecuniary loss of only $34,000, and the underlying conduct had never previously been declared unlawful or been deemed punishable in such a large amount by the jurisdiction providing the substantive law governing the rights and obligations of the litigants. This case provides an excellent vehicle for the Court to articulate the standards for due process review of the excessiveness of punitive damages in a context where such guidance is truly needed.

CONCLUSION

For the foregoing reasons, certiorari and plenary review should be granted in this case to address the important issue of the standards to be applied by federal courts in

conducting due process review of punitive damages awards for excessiveness. In the alternative, the Court should retain the case on its docket and dispose of the case appropriately in light of its decision in *BMW of North America, Inc.* v. *Gore*.

September 14, 1995 Respectfully submitted,

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